United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7140

To Be Argued By
John A. Mitchell

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

M & T CHEMICALS, INC.,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee,

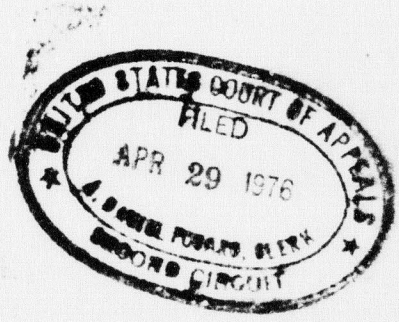
and

HERMAN KORETZKY

Defendant-Appellee.

- -x

Docket No. 76-7140



APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING A MOTION FOR AN ORDER UNDER RULE 4(a), RULES OF APPELLATE PROCEDURE

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I

INTRODUCTION

This is an appeal by plaintiff-appellant, M & T Chemicals, Inc., (hereinafter "M & T") pursuant to 28

U.S.C. §1291 from an order of United States District Judge Robert L. Carter, United States District Court For The Southern District Of New York, finally denying M & T's motion under Rule 4(a), Federal Rules Of Appellate Procedure, for an order upon a showing of excusable neglect to extend the time for filing a notice of appeal from a final order of Judge Carter dismissing M & T's Amended Complaint in the District Court (A 46).*

II

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion in failing to find excusable neglect and declining to grant M & T's motion under Rule 4(a), F.R.App.P., for an extended period of time in which to file a notice of appeal to this Court.

2. Whether the District Court in declining to grant M & T's motion, under Rule 4(a), F.R.App.P., for an extended period of time in which to file a notice of

* In this brief reference is made by means of the letter "A" followed by the appropriate appendix page numbers to the joint appendix, which consists of a separate bound volume of xerographically duplicated materials.

appeal to this Court made clearly erroneous findings of fact and inferences drawn from such findings in determining that there was no excusable neglect.

III

STATEMENT OF THE CASE

In Civil Action No. 74 Civ. 5666 RLC, filed December 26, 1974, and from which this appeal is taken, M & T sought, among other requests for relief, to obtain an order assigning to it United States Patent No. 3,354,059 (hereinafter the "-059 patent") which listed Herman Koretzky as the sole inventor. The patent had been assigned by Koretzky to International Business Machines Corporation (hereinafter "IBM"). According, IBM and Koretzky were listed as defendants (hereinafter collectively also called "IBM") in the original complaint which was amended on January 10, 1975 to add some exhibits. Jurisdiction was primarily based on the diversity of citizenship of the parties,

28 U.S.C. §1331, but also on 28 U.S.C. §1338 for patent matters and the Patent Laws of the United States Title 35, U.S. Code.

In the amended complaint M & T alleged that Koretzky had actually made the invention of the -059 patent, or its substantial equivalent, along with at least another co-worker, while they were in the employ of a company called Hanson-Van Winkle-Munning Company (hereinafter "H-VW-M"),a predecessor in interest to M & T (A 5). If IBM had not issued the -059 patent, the primary invention claimed therein would have remained a trade secret and the sole property of M & T. However, the issuance of the patent by IBM destroyed the secret status of the development.

After answering, IBM moved in the District Court for an order dismissing the amended complaint on the grounds that it was barred by the New York State statute of limitations for tort actions. In opposing the motion to dismiss, M & T argued that the continued use of the M & T trade secret, even though it was now patented by IBM, was a continuing tort following the

original act of misappropriation of IBM in issuing the patent. Each act by IBM in exploiting the patent, such as by licensing it to others, created a new and continuing tort and the New York statute of limitations began to run anew with each such act.

IBM's motion to dismiss was granted in an opinion dated November 19, 1975 (A 17) but the judgment order was not entered on the docket in the District Court until December 5 (A 32). Thereafter, on December 15 M & T moved to reargue under Rule 59(e), F.R.Civ.P., and Local Rule 9(m) (A 34). The motion for re-argument particularly emphasized the fact the amended complaint also contained allegations of jurisdiction for a Federal cause of action which was not affected by the New York statute of limitations and the complaint should not be dismissed as to the Federal cause of action. That motion was also denied in an order filed on January 9, but dated January 8 (A 46). However, through excusable neglect which will be discussed in greater detail, infra, M & T's attorneys failed to learn

of the denial of the motion to reargue until February 19, 1976.

The original thirty day period to file a notice of appeal from the order of January 9 expired on February 7.

On February 20 M & T did file a notice of appeal from the January 9 order (A 66) and immediately moved before the District Court for an order under Rule 4(a) F.R.App.P., to enlarge the time for filing the notice of appeal (A 55). M & T's motion under Rule 4(a) was denied by Judge Carter in an opinion dated March 10 (A 102) and entered on the docket on March 11. Immediately thereafter on March 12, M & T moved for reargument under Local Rule 9(m) setting forth matters and controlling decisions which it believed were not fully considered by Judge Carter in making his decision (A 109).

M & T's motion for reargument was also denied by Judge Carter without an opinion (A 121) and entered on the docket on March 22. It is from that final order and the opinion of March 10 (A 102) that this appeal was taken by filing a timely notice on March 23, 1976 (A 126).

A. The Events Showing Excusable Neglect

When M & T filed its original motion on December 15 to amend or reargue under Rule 59(e) F.R.Civ.P. and Local Rule 9(m), with respect to the District Court's order granting IBM's motion to dismiss based on the statute of limitations, its attorneys sought an order under Rule 4(a), F.R.App.P., extending the time to appeal until the fixed date of February 3, 1976 (A 34). The reason for that action was to insure that if there was any defect in the original motion under Rule 59(e) and Local Rule 9(m), M & T would not lose its opportunity to appeal. Judge Carter's Clerk advised M & T's attorney that such an order was not necessary and stated that an affidavit to the effect that the motion was filed in good faith would eliminate the need for such an order. The affidavit was filed as requested and the order was not signed (A 44).

IBM served a memorandum in opposition to the M & T motion on December 29, 1975. When a copy of

IBM's opposition memorandum was received, John A. Mitchell, M & T's principal attorney in this matter, testified by affidavit (A 67) that he read the memorandum and, having been away from his office from December 19, 1975 until January 5, 1976 called the chambers of Judge Carter to determine if the Court had decided the then pending motion. He was advised that the Court had not. Mitchell then began the practice of checking the notice of decisions published each day in the New York Law Journal in order not to miss the Court's decision. He filed his affidavit to this fact.

On January 13, 1976 the Law Journal published two sets of listings of decisions by the District Court. It published decisions for both January 8 and January 9 (A 72, 73).* In the usual manner the decisions were listed under the name of each judge in alphabetical order. Mitchell checked the decisions listed for Judge Carter for January 8, but did not

* In the joint appendix the decisions for the two days are shown on two separate pages of the appendix. However, when published they were on one page of the Law Journal with page 72 the upper half and page 73 the lower half of a single page.

realize a second set of decisions for January 9, also listed under the name of each judge in alphabetical order, was to be found at the bottom of the page (A 73) where the decisions by Judge Carter for January 8 were listed at the top of the page (A 72).

In addition to Mitchell checking the Law Journal another attorney, Pasquale A. Razzano, also checked each day to see if a decision had been reached on the motion to amend or reargue. Razzano cannot explain why he did not note the decision unless he overlooked it (as Mitchell did) or forgot to check the Law Journal on January 13. He did testify by affidavit that it was his practice to check the decision listings each day.

Not knowing of the Court's decision of January 9, published on January 13, M & T, through its attorney Mitchell, filed a reply memorandum (A 47) to the IBM opposition to M & T's motion. In this reply memorandum M & T emphasized that the New York statute

of limitations which was the sole basis cited by Judge Carter for dismissing the amended complaint, did not have any bearing on the Federal cause of action. This issue had not been considered by Judge Carter in his opinion of November 19 which was the basis for the order of December 5. This reply memorandum was served on IBM by mail on January 14, 1976 and actually filed in the Court on January 15, 1976 - six days after the Court had already decided the motion.

Both Mitchell and Razzano continued to check the Law Journal each day since they were unaware of the decision of January 9. The M & T reply memorandum was received by the District Court Clerk and entered on the Court docket sheet. IBM also received its copy of the reply memorandum. IBM received this memorandum after January 14, but it never inquired of M & T's attorneys as to why it was being filed, even though IBM had received a postcard notice from the Clerk's Office on January 14, 1976 of the January 9 decision.

M & T's attorneys never received a notice of the January 9 order from the Clerk's Office although the docket sheet noted that one was mailed to the attorneys. Both Mitchell and Razzano testified by affidavit that neither received the card. (A 58, 70) Further, Razzano testified that he personally inquired of other personnel in the attorneys' office and none had seen the card. (A 58) From what has now been learned from a study of the postcard received by IBM, the card mailed by the Clerk and intended for M & T's attorneys was most probably misaddressed. The postcard which was received by IBM was not addressed to IBM's attorneys. A photocopy of that card was filed by IBM (A 88) in opposing the motion to enlarge the time for appeal. It shows a handwritten address of:

"I.B.M Corp
P.O. Box 218
Yorktown Heights, NY 10598"

The attorney for IBM as listed on the docket sheet in the Clerk's Office (A 1) is:

"Hansel L. McGee, P.O. Box 218

Yorktown Heights, NY 10598"

The card IBM received was not addressed to attorney McGee. It was misaddressed to the client "IBM". However, because it was addressed to a post office box it was delivered to that box and eventually to IBM's attorneys who had the same post office box address.

Assuming one was sent which was intended for M & T's attorneys it, like the one intended for IBM's attorney,was undoubtedly also misaddressed.

The docket sheet (A 1) lists M & T's attorneys as:

"John A. Mitchell, Esq.

Curtis, Morris & Safford

530 5th Ave, NYC 10036"

If the card intended for M & T's attorneys was misaddressed as was the IBM card it would read:

M & T, Inc.

530 5th Ave.

NYC 10036

Such a card would be undeliverable. Also, the postal service today does not normally return such undeliverable cards to the sender.

Not having received a card from the Clerk's Office and believing that the reply memorandum filed on January 15, 1976 was under consideration by the Court, both M & T attorneys continued to review the Law Journal entries each day watching for a decision by Judge Carter.

On Friday, February 13, planning to be away from the office the following week Mitchell left a note, after the close of business, for Razzano to have someone check the docket entries at the District Court during his absence to be sure a decision of the Court was not overlooked. Since the reply memorandum was filed on January 15 checking during the week of February 16 was done as a routine matter.

On February 19 the check was made by a clerk and the entry of the Court's decision on January 9 was discovered. This was the first actual notice that M & T's attorneys had of the Court's decision.

On February 20, a notice of appeal was filed and a motion under Rule 4(a), F.R.App.P. was made to enlarge the time for filing the notice of appeal. That motion was denied in an opinion dated March 10.

B. The District Court Decision On The Motion To Enlarge Time

In his opinion of March 10, 1976 (A 102) Judge Carter based his decision in refusing to grant the enlarged time for filing a notice of appeal primarily on the following grounds:

1. The fact that IBM's counsel received a notice of entry of judgment by a card from the Clerk's Office supports the inference "drawn from

the docket sheet entries that a post card was, in fact, sent and that it was mailed to the correct address" of M & T's attorneys (A 106).

2. M & T's attorneys made no effort to explain why "they did not call chambers or the Clerk's Office from January 5th to February 19th, a period of almost six weeks". (A 107).

3. The fact that "the lawyer working on the case was told to make inquiry about the status of the motion for reargument on February 13th," but, "in fact did not get around to making the telephone call until February 19th". (A 108).

In a motion for reargument under Local Rule 9(m) M & T attempted to explain away each of the grounds relied upon by Judge Carter. The motion was unsuccessful and was denied without an opinion on March 22. Thereafter, on March 23 a notice of appeal was filed from the final order of March 22, 1976.

C. There Has Been No Oral Testimony Or Hearing

In this case all matters have been handled by written pleadings. There was no oral testimony by witnesses and there have been no hearings before the District Court by the attorneys for the parties. The evidence which was before the District Court is the exact same evidence which is before this Court.

IV

A R G U M E N T

At the outset M & T realizes that while it has the normal burden imposed on any appellant, that burden is increased in this appeal since M & T must show that there was an "abuse of discretion" by the District Court and key findings which were made were "clearly erroneous". We accept that burden for the simple reason that we believe that in the present case a clear showing was made in the District Court of "excusable neglect" in not filing a timely

notice of appeal. Therefore, the time to appeal should have been enlarged as permitted by Rule 4(a), F.R.App.P.

Rule 4(a), F.R.App.P., provides in the pertinent part involvedin this appeal:

> "Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

A. Denial Of Excusable Neglect Requires A Finding Of Actual Notice

On the question of what is "excusable neglect", whenever the District Court has refused to find such and not enlarge the time, the movant has generally had some form of actual notice of the entry of judgment. In the present case M & T had no actual notice of any kind of the entry of the order on January 9, until a routine check on February 19 disclosed it.

Indeed, even when one attorney for a party neglected to tell trial counsel for the party of the entry of an order that was found to be excusable neglect. Resnick v. Lehigh Valley R. Co., 11 F.R.D. 76, 77 (S.D.N.Y. 1951).

B. The Doctrines Of "ABUSE OF DISCRETION" And "CLEARLY ERRONEOUS" Permit The Court Of Appeals To Substitute Its Evaluation Of Documentary Evidence

A definition of what is "abuse of discretion" is found in the oft cited case of In re Josephson, 218 F.2d 174, 182 (1 Cir. 1954). There the Court stated:

> "Determination of abuse of discretion involves the exercise, by us, of sound judgment upon the facts. If there is controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and it should not be. Then appellate court's review does not include trial court's discretion.

> If, however, the facts are not in dispute and it is a question of sound judgment based upon the undisputed facts which are before us as fully as before the trial judge, we are in about as good a position as he to say whether the discretion has been wisely exercised. In short, both trial and appellate courts have the same situation upon which to exercise the same sound judgment."

If one accepts the definition of "abuse of discretion" as found in In re Josephson it is submitted that the tests which this Court has on many occasions applied to the "clearly erroneous" standard should also be applied to a question of "abuse of discretion".

As stated, supra, there was no evidentiary hearing or oral argument of any kind in this case in the District Court. The entire proceedings in the District Court were by filed papers. All that Judge Carter had before him in reaching his decision and rendering the order now on appeal were the same documents which are before this Court.

This Court has previously stated on the question of whether or not a lower court's findings were "clearly erroneous", where there was no evidentiary hearing below and the credibility of witnesses did not play an essential part in the District Judge's determinations, "We [the Court of Appeals] are in as good a position as the district judge to read and interpret the pleadings, affidavits and depositions and thus have broader discretion on review." Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2 Cir. 1972). See also Severi v. Seneca Coal & Iron Corporation, 381 F.2d 482, 488 (2 Cir. 1967); Shiya v. National Committe Of Gibran, 381 F.2d 602, 606 (2 Cir. 1967); Dempster Brothers, Inc. v. Buffalo Metal Container Corp., 352 F.2d 420, 423 (2 Cir. 1965); and Agrashell, Inc. v. Bernard Sirotta Company, 344 F.2d 583, 589 (2 Cir. 1965).

Even if there had been an evidentiary hearing, but without a jury, in such cases where the trial

judge relies almost exclusively on inferences drawn from documents and undisputed facts, the Court of Appeals may substitute its evaluation of the evidence for that of the District Court. In Iravani Mottaghi v. Barkey Importing Co., 244 F.2d 238, 248 (2 Cir. 1957) the Court stated:

"II. Scope of Review

> The issues before us, with but a few exceptions, are largely factual, and as the district court was trying the facts without a jury, its 'findings of fact shall not be set aside unless clearly erroneous.' Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. But the words 'clearly erroneous' do not have a fixed meaning; their content varies with the nature of the evidence. See Gindorff v. Prince, 2 Cir., 1951, 189 F.2d 897. Ultimately, the rule is always this: 'A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. U. S. Gypsum Co., 1948, 333 U.S. 364, 395, 869, 68 S.Ct. 525, 542, 788, 92 L.Ed. 1147.

> Turning to the evidence before us in this case, it is clear that for his conclusions the trial judge relied almost exclusively on inferences drawn from documentary evidence and undisputed facts. See e.g., 134 F.Supp. at page 730.[8] The oral testimony was rarely relied on, except for such admissions as were made and for ascertaining the intentions of the parties. There was ample justification for this treatment of the evidence in the many inconsistencies and confusions in the testimony offered by both sides. See 134 F.Supp. at page 724. Under such circumstances, we are in as good a position as the district court to evaluate the evidence."

Even on questions of "abuse of discretion" courts of appeal have substituted their judgment for that of the trial judge.

> "Determination of abuse of discretion involves the exercise, by us, of sound judgment upon the facts. If there is controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and it should not be. Then appellate court's review does not include trial court's discretion.
>
> If, however, the facts are not in dispute and it is a question of sound judgment based upon the undisputed facts which are before us as fully as before the trial judge, we are in about as good a position as he to say whether the discretion has been wisely exercised.

> In short, both trial and appellate courts have the same situation upon which to exercise the same sound judgment."

In re A. Roth Co., Inc., 125 F.2d 396, 398 (7 Cir. 1942).

While discretion must be accorded the District Court in its resolution of its normal decisions, when the Court of Appeals is convinced that the District Court has exceeded a proper discretion, the Court of Appeals "would be remiss in our duties if we did not set that order aside". Syracuse Broadcasting Corporation v. Newhouse , 271 F.2d 910, 915 (2 Cir. 1959).

C. Erroneous Facts Were Found And Incorrect Inferences Drawn By The District Court

We believe that the evidence in this case shows that the District Court made errors in the factual findings on which it based its decision that there was no excusable neglect.

The Court found that the docket sheet in the Clerk's Office contained the correct addresses of the counsel for M & T and IBM. It also found that IBM's counsel had asserted they received notice of the entry of judgment. With those facts we have no disagreement. However, we do disagree with the inference which the Court drew w en it stated (A 106):

> "In addition, by memorandum and exhibit, defendants' counsel assert that they received notice of the entry of judgment. This fact supports the inference that may be drawn from the docket sheet entries that a post card was, in fact, sent and that it was mailed to the correct address. If such notice was actually sent to plaintiff's counsel, it is difficult for plaintiff to rely [illegible] heavily on its contention that no [illegible]ce was received."

Contrary to what the Court found as an inference, the evidence in this case shows that the card received by the attorneys for IBM was not mailed to the correct address (A 88). On the basis of that evidence the inference which the Court should have drawn is that the card sent to M & T's

attorneys was also misaddressed and undeliverable. That is the only logical inference which may be drawn.

We agree with the District Court's conclusion that the failure to receive a card of and by itself is not enough to qualify the failure to file a Notice of Appeal as "excusable neglect", but, we do believe it is one factor that the Court should consider in deciding whether or not to lengthen the time for appeal (A 106).

The Court's erroneous inference that a correctly addressed card was sent to M & T's counsel was obviously a factor in finding that there was no excusable neglect.

The Court apparently did accept the fact that M & T's counsel attempted to explain the failure to notice the entry in the Law Journal (A 107). It is believed that this failure to notice the entry in the Law Journal, together with the failure to receive a card from the Clerk, would normally justify a finding of excusable neglect. The

entry of two sets of decisions for Judge Carter published the same day with one set of decisions at the top of the page and one at the bottom of the page would allow for inadvertence in omitting to observe the second set of entries.

With the Law Journal error explained, the Court in its opinion (A 107) found that:

> "But counsel made no similar effort to explain why they did not call chambers or the clerk's office from January 5th to February 19th, a period of almost six weeks. The failure to make a telephone inquiry as to the status of a case for six weeks makes it impossible for me to view this as a case of excusable neglect." (Emphasis added)

As pointed out, supra, and as stated in the affidavit of Mitchell, the telephone inquiry was made on January 5 because Mitchell had been away from the office since December 19th, a period of sixteen days and he wished to make sure that no decision had been handed down in his absence (A 69). Once so advised he began work on a reply memorandum

which was actually mailed to the attorneys for IBM on January 14, 1976 (A 69) and filed with the Court on January 15, 1976 (A 70). Not being aware of the decision of the Court filed on January 9, M & T's counsel believed that their reply memorandum was being given consideration by the Court.

The reply memorandum centered on the argument that the dismissal of the amended complaint was based only on the New York statute of limitation covering a misappropriation "of plaintiff's trade secret not to any rights which plaintiff has under the patent laws of the United States, Title 35 United States Code" (A 47). M & T further argued in that memorandum that there was a Federal cause of action involved in this suit and as to that cause of action there was no Federal statute of limitations on the power of the court to declare that the patent involved was a joint invention and not a sole invention of Koretzky (A 47-48).

These matters had not been treated by the

Court in its opinion of November 19, 1975 filed on December 5, 1975 (A 17). Since the Court had not discussed them previously the assumption was made that the Court was carefully considering them for the first time.

Since the reply memorandum was filed on January 15, the checking with the Clerk's Office in mid February one month later to see what the docket sheet showed was simply a safety check to insure that the motion had not been decided. Indeed, it is a showing that M & T's attorneys were carefully following the progress of the case.

The District Court in its opinion questions the fact that the inquiry to the lawyer working on the case to inquire as to the status of the motion was made on February 13 and nothing was done until February 19 (A 108). This is readily explained. As was pointed out in the affidavit of Mitchell his request for an inquiry was made by a note left after working hours on Friday February 13. Monday, February 16 was a Court holiday (A 99, 100). There was nothing

to lead anyone to believe that there had been a quick decision filed on January 9. The reply memorandum filed on January 15, raised a substantial question which was believed to be of such importance that the District Court had it under review. The delay of two days from February 17 to February 19 in checking the docket entries does not justify the conclusion that M & T was negligent in failing to follow the status of the case.

When one considers that there was an obviously misaddressed notice from the Clerk's Office, two attorneys following the progress of the motion in the Law Journal, a double entry of decisions occurred on the critical day of January 13 in the Law Journal, the reply memorandum filed on January 15 was believed to be under consideration and a back up check was made in the Clerk's Office on February 19, it is submitted that the District Court drew erroneous inferences, failed to consider

pertinent evidence, particularly the filing of the January 15 memorandum, and abused its discretion in not granting the enlarged time for appeal.

This Court on the documentation which is before it on this Appeal is in exactly the same position as was the District Judge and should be able to substitute its own opinion for his.

D. The Issue In The Original Motion Is Of Sufficient Importance To Be Decided By The Court Of Appeals

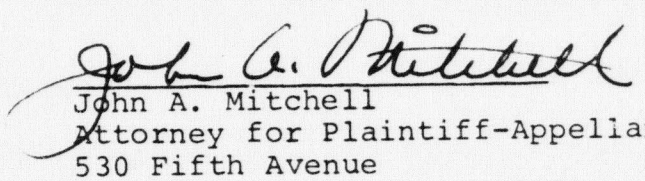
The issue which was originally involved in the motion to dismiss is one which has not been ruled upon by this Court and it has been decided differently by other Courts. The filing of the original motion for reconsideration and reargument was for the purpose of having all the issues clearly before this Court on the appeal from the original dismissal.

The attorneys for M & T were so desirous of protecting their opportunity to appeal from that original decision, that they carefully asked the Court for an order fixing a certain date for appeal so that there would be no mishap and a failure to file a timely appeal (A 34). The Court did not grant that order since the Court apparently felt it was unnecessary. Of course, if the originally requested order for an extension of time had been granted for a fixed date, a timely appeal would have been filed and this special appeal would not be before the Court.

CONCLUSION

For the foregoing reasons it is requested that the Order of the District Court be reversed, excusable neglect be found and the time for M & T to file a notice of appeal be enlarged pursuant to Rule 4(a), Federal Rules Of Appellate Procedure.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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this 29th day of April, 1976 by first class mail postage prepaid.

John G. Pittenger